No. 07-1037

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RITA J. CARLS, and NICHOLAS ANTHONY BERNARDONI and ANDREA R. BERNARDONI, minors by and through their Guardian ad Litem PETER BERNARDONI,

Petitioners,

v.

BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L PROPERTIES,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because it presents no issue worthy of this Court's attention. In an unpublished opinion, the California Court of Appeal, Third District held that petitioners failed to produce any evidence and therefore were unable to rebut respondent's evidence that respondent Blue Lake Housing Authority (Blue Lake) did not waive its sovereign immunity. That decision made no new law. To the contrary, the California Court of Appeal decision is based simply on petitioners' failure to present sufficient evidence on the issues before the court.

The petitioners ignore the evidentiary basis for the California Court of Appeal ruling and mischaracterize the decision below as an expansion of tribal immunity. However, the ruling does not redefine the scope of tribal immunity because the opinion is narrowly based upon petitioners' failure to produce any evidence.

The petitioners allege no split of authority and review should be denied for that reason alone. The California Court of Appeal ruling also lacks extraordinary factors to justify review. The decision below is unpublished and it is not applicable to other individuals or transactions because the narrow scope of the ruling is based on the lack of discovery conducted and the lack of evidence presented by these particular petitioners. The ruling will not cause some new irreparable harm because it simply applies existing

law that requires individuals to present evidence in support of a claim of waiver of tribal immunity. The petitioners' failure to present evidence also produced an inadequately developed record.

The petition should be denied because it does not present a necessity to secure uniformity of decision, does not assert an important question of law, and does not present extraordinary factors to justify review.

STATEMENT OF THE CASE

A. Factual Background

On February 28, 2005, petitioners filed an action in El Dorado County Superior Court against respondent and others related to alleged construction defects in a home purchased by one of the petitioners, Rita Carls, in March, 2000. Petitioners' action alleges that respondent Blue Lake was the owner, developer and/or builder of the home.

Respondent filed motions to quash service of petitioners' First Amended Complaint. Respondent presented evidence in support of its motions to establish that it was a tribal governmental instrumentality of the Blue Lake Rancheria, a federally recognized Indian tribe, and that it did not waive its tribal immunity. Petitioners did not conduct any discovery on these issues and presented no evidence in support of their opposition to the motions to quash.

The evidence submitted by respondent Blue Lake was sufficient to establish that it was a tribal entity entitled to immunity, absent a waiver. Respondent Blue Lake submitted a declaration of its chief operations officer, Michael Hansen, stating that the Blue Lake Housing Authority was an arm of the Blue Lake Rancheria Tribe, organized and operated by the tribe to promote the business and economic interests of the tribe. Petitioners presented no evidence to the contrary.

Respondent's declaration stated that it acquired the assets and liabilities of J&L Properties on June 30, 2004. The declaration did not indicate whether there was an express or implied assumption of liabilities by respondent Blue Lake. The declaration did not state the manner of respondent Blue Lake's acquisition. Significantly, the declaration stated that respondent neither consented to nor agreed to jurisdiction in the state court and did not waive its sovereign immunity by any act or communication.

Petitioners did not conduct any discovery, did not produce a copy of the agreement between respondent Blue Lake and J&L, and did not present any evidence as to the nature of that transaction. Petitioners argued at the hearing on the motions to quash that respondent was bound to the terms of an alleged arbitration agreement between J&L Properties and Rita Carls, one of the petitioners. The only mention of an arbitration agreement in the record is in an unauthenticated Contract of Purchase attached to petitioners' complaint. Pet. App. I1-I31.

Significantly, the rights petitioners have asserted do not even arise under these contract provisions. The arbitration provisions relied upon by petitioners are limited in application to "disputes regarding liquidated damages, based on alleged default of buyer,"[1] Pet. App. I3, or to disputes between buyer and JTS Communities related to the coverage of the Warranty.[2] Pet. App. I26-I28. These contract provisions impose an obligation on the parties to arbitrate. Pet. App. I3-I5. Petitioners did not seek to arbitrate any of their claims.

The El Dorado County Superior Court granted the motions to quash stating that "there is no evidence before the court that in acquiring the assets and assuming the liabilities [respondent Blue Lake] expressly consented to jurisdiction." Pet. App. D9.

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[1] Any default of buyer would have taken place prior to the March, 2000 close of escrow and thus prior to the June 30, 2004 transaction between respondent Blue Lake and J&L Properties.

[2] Any claim under the Warranty would have to be made prior to the expiration of the Warranty. Petitioners failed to produce the Warranty or any evidence as to whether the Warranty was still in effect at the time of the June 30, 2004 transaction between respondent Blue Lake and J&L Properties. Petitioners failed to produce any evidence as to whether the Warranty was assignable or transferable. The petitioners failed to produce any evidence that the Warranty covered items claimed by petitioners.

B. The California Court of Appeal's Decision

In an unpublished opinion, the California Court of Appeal, Third District, found that petitioners failed to produce any evidence to rebut respondent's evidence that it was a tribal business entity entitled to tribal immunity and that it did not waive this immunity. The California Court of Appeal concluded that respondent established it was an arm of the Blue Lake Rancheria, a federally recognized Native American tribe, based on the declaration of its chief operations officer.

The Court of Appeal held that the declaration shifted the burden to petitioner to challenge respondent Blue Lake's assertion of tribal immunity, relying upon *School Dist. Of Okaloosa County v. Superior Court*, 58 Cal.App.4th 1126, 1131 (1997). Pet. App. A4. The California Court of Appeal concluded that petitioners "submitted no *evidence* that [respondent] Blue Lake was not related to the function and purpose of the tribe" and that petitioners "submitted no evidence at all in opposition to [respondent] Blue Lake's motions." Pet. App. A7. The California Court of Appeal explained "[o]n this record, we must conclude [respondent] Blue Lake established it was an arm of the tribe, entitled to tribal sovereign immunity." Pet. App. A7.

When the California Court of Appeal turned to the issue of whether respondent had waived its immunity, it stated that "[t]he problem for [petitioners] once again is evidentiary." Pet. App. A9. The

Court of Appeal applied settled law when examining whether respondent Blue Lake waived its immunity. This settled case law requires any waiver of sovereign immunity to be "clear," *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001), "unmistakable," *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1995), and that a waiver "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006); *Demontiney v. United States*, 255 F.3d 801, 812-813 (9th Cir. 2001). Waivers are "strictly construed." *Ramey Const. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 320 (10th Cir. 1982). There is a "strong presumption" against them. *Demontiney v. United States*, 255 F.3d at 811.

Petitioners do not argue that the California Court of Appeal applied the wrong standards or case law. The California Court of Appeal held that case law required petitioners to present evidence that any claimed waiver of immunity by respondent was unequivocal and clear. The court ruled that petitioners "failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over [respondent] Blue Lake in this action" due to the lack of evidence submitted by petitioners. Pet. App. A10.

The California Court of Appeal did not expand sovereign immunity standards but instead focused on the petitioners' evidentiary shortcomings. The Court

of Appeal applied well-settled standards that do not conflict with any decision of this Court.

C. The California Supreme Court

The California Supreme Court denied review.

REASONS FOR DENYING THE PETITION

The decision of the California Court of Appeal presents no issue worthy of this Court's attention. The decision of the California Court of Appeal, Third District, is based on petitioners' failure to conduct discovery and to present sufficient evidence on the issues before the court. The petition does not describe any lack of uniformity of decisions on the issues presented. The opinion is not remarkable; it does not change any established law nor does it create new questions of law. The fact specific opinion does not apply to anyone other than these petitioners and this respondent and therefore does not raise any issue of national interest.

A. The California Court of Appeal's Decision Is Not in Conflict With Other Courts

The petitioners do not allege a split of authority. The petition should be denied because it does not present a necessity to secure uniformity of decision.

B. The California Court of Appeal Correctly Applied This Court's Precedents

The California Court of Appeal ruling does not depart from well established law. Nor does it create new questions of law. Petitioners do not assert that the state court ignored relevant law from this Court.

The petitioners' claim that sovereign immunity was expanded as a result of the ruling is unfounded. Petitioners do not, and cannot, point to any improper rule or standard applied by the California Court of Appeal. Petitioners instead complain of a misapplication of a properly stated rule of law and focus on the outcome of the Court of Appeal's ruling, rather than the manner in which the Court of Appeal reached that conclusion. The outcome was the result of petitioners' failure to provide evidence in support of their claims.

The California Court of Appeal made no effort to expand sovereign immunity. The lower court highlighted the limited scope of its ruling by stating that respondent Blue Lake "might" have waived its tribal sovereign immunity "as a theoretical premise" and that petitioners "might" have been able to establish a waiver of immunity if it provided a copy of the agreement between respondent Blue Lake and J&L Properties. The court ruled that "[w]ithout such evidence, [petitioners] failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over [respondent] Blue Lake in this action." Pet. App. A10.

This case is an extraordinarily poor vehicle for deciding waiver of sovereign immunity issues because of the petitioners' failure to adduce any evidence of the transaction between respondent Blue Lake and J&L Properties in which a waiver is claimed to have been effectuated.

In addition, petitioners were not even seeking enforcement of the arbitration provisions upon which the waiver claim is based. Petitioners' premise that this case is just like *C & L Enterprises* is flawed since the only arguable waiver is contained in provisions pertaining to an arbitration which petitioners failed to pursue. Petitioners are claiming a right to sue that was not even negotiated in the contract with the non-tribal entity.

Petitioners do not assert an important question of law and the petition does not provide any basis for review.

C. The California Court of Appeal's Decision Does Not Create an Issue of Significant Importance and Compelling Need for Intervention by This Court

No extraordinary factors of national interest justify review. The decision below is unpublished and it is not applicable to other individuals or transactions. The narrow scope of the ruling is based on the lack of discovery conducted by petitioners and the lack of evidence presented by these particular individuals. The ruling will not cause some new irreparable harm

because it simply required these individuals to present evidence in support of a claim of waiver of tribal immunity.

The Court of Appeal held that "the problem for [petitioners] . . . is evidentiary." Pet. App. A9. The statement of facts in the Court of Appeal opinion found that "[petitioners] submitted no *evidence* [respondent] Blue Lake was subject to state suit for the liabilities of J&L Properties." Pet. App. A7. Petitioners fail to show how these evidentiary problems would apply to other individuals or create an issue of significant importance and compelling need for intervention by this Court. Further, there is a distinct absence of a minimally adequate record for this court to review.

CONCLUSION

Because this case is narrowly tied to its particular facts and presents no issue warranting review by this Court, the petition for a writ of certiorari should be denied.

Dated: April, 2008

Respectfully submitted,

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